RECENT DECISIONS.

ADMIRALTY—JURISDICTION OF UNITED STATES COURTS OF ADMIRALTY OVER TORTS COMMITTED ON FOREIGN VESSELS. The plaintiff, an American citizen, was injured on a British ship on the high seas by the negligence of the servants of the defendant in charge of the ship. The defense was that English Courts of Admiralty did not have jurisdiction in such cases and that, therefore, the United States Courts of Admiralty, since they had to administer the British law as the defendant was a British subject, could not take jurisdiction. *Held*, the United States Courts of Admiralty had jurisdiction irrespective of the question whether or not the British Courts of Admiralty would have had in a case of this kind. *Pouppirt* v. *Elder Dempster Shipping, Limited* (1903) 122 Fed. 983.

Although no other case presenting the same facts as here stated is to be found, the decision is in accord with the well-settled rule of international law, that, in the absence of treaty, nothing within the territory of a nation is without its jurisdiction, and that in time of peace, all persons have the right to resort to the tribunals of the nation where they happen to be for the protection of their rights. Benedict's Admiralty, § 282; *The City of Carlisle* (1889) 39 Fed. 807; *The Barque Havana* (1858) 1 Sprague 402.

AGENCY—COMMITTEE OF UNINCORPORATED ASSOCIATION—LIABILITY OF MEMBER. A committee of a military company, appointed for other purposes, assumed the preparation of a memorial souvenir booklet and delegated full managerial and financial responsibility to one of its members. The latter procured the matter to be printed by the plaintiff who sued the treasurer of the company under § 1919 Code Civ. Proc. which allows an action against the president or treasurer of such an association where the members thereof are jointly or severally liable. *Held*, defendant not liable. *Stikeman* v. *Flack* (1903) 175 N. Y. 50.

The Court of Appeals reversed the Appellate Division, First Department, upon the dissenting opinion of Mr. Justice Ingraham, concurred in by Hatch, J, which opinion accords with the principles of liability of a club member suggested in 3 COLUMBIA LAW REVIEW 407. The facts that the association was not a business one requiring the creation of indebtedness to carry out its purposes, and that no agency to incur the obligation in dispute was shown, were regarded as controlling.

CARRIERS—"ACT OF GOD." The plaintiff shipped wheat by the defendant's road. The defendant was negligent, causing delay in delivery of goods which were destroyed by an unprecedented storm. Had it not been for the defendant's negligence no loss would have occurred. *Held*, the violent storm was the proximate cause of the loss which was therefore due to the "Act of God" and excused the carrier. *Hunt Bros.* v. *Missouri K. & T. Ry. Co. of Texas* (Tex. 1903) 74 S. W. 69. See NOTES, p. 484.

CARRIERS—EXPULSION OF PASSENGER—"SCALPING" ON TRAIN. Plaintiff had been doing a small "scalping" business in defendant's tickets, had been warned to desist, and had promised to do so. The manager of the defendant, having reason to believe plaintiff had not desisted, had him ejected from a train, on which he was a regular passenger going to and from his work. Plaintiff had not "scalped" any tickets on that trip, nor did the manager have any reason to believe he intended to do so. *Held*, the ejection was unlawful. *Ford* v. *East Louisiana Ry. Co.* (La. 1903) 34 So. 585.

It is well settled that the plaintiff could have been lawfully ejected had he been detected while on the train in the act of dealing in the tickets, or if it had been his evident purpose to deal in them there. *The D. R.*

Martin (1873) 11 Blatch. 233. It has also been held, though the reasoning is not so convincing, that a carrier may refuse to carry one whose object in reaching his destination is to return by the same line and, on such return trip, to solicit trade for a rival. Per STORY, J., in *Jencks* v. *Coleman* (1835) 2 Sumn. 221. The principal case tests the right of a carrier to eject one who is travelling as an ordinary passenger, merely because he has been a chronic offender against its rules. The Court properly refused to sanction any such right.

CARRIERS—RIGHT TO CHANGE LOCATION OF STATION. The defendant railroad had had a station at B., but owing to the fact that it did not pay its expenses, removed same to D. some years later. Those living near B. had built their roads and conducted their businesses with reference to the location of the station. *Held*, the railroad could be compelled, by mandamus, to move the station back to B. *State* v. *Northern Pacific Railway Co.* (Minn. 1903.) 96 N. W. 81. See NOTES, p. 485.

CONFLICT OF LAWS—PREFERENCE OF PLEDGEES UNDER A VOLUNTARY ASSIGNMENT FOR THE BENEFIT OF CREDITORS. A Minnesota grain corporation, having elevators in that and other states, pledged its warehouse receipts as security for notes given to some of its creditors, none of whom resided in any of the other states. Such a pledge was valid under the laws of Minnesota, but invalid in the other states. The corporation made a voluntary assignment for the benefit of creditors. The pledgees claimed a preference in the distribution of the fund arising from the sale of all the grain in the warehouses. *Held*, that the laws of the *situs* of the personalty governed, and no preference should be given the pledgees in respect to the grain in the other states. *In re St. Paul & K. C. Grain Co.* (Minn. 1903) 94 N. W. 218. See NOTES, p. 488.

CONSTITUTIONAL LAW—COMPULSORY REGISTRATION OF ELECTORS. Plaintiff on behalf of himself and 5,000 other negroes prayed for compulsory enrollment on the voting lists of Montgomery Co., Ala., and for a declaration that certain sections of the State constitution fixing the qualifications for registry be held void as repugnant to the Fourteenth and Fifteenth Amendments to the Constitution of the United States. *Held*, the relief was properly denied as equity does not remedy political wrongs, and even if it did it would not aid a party to enrollment under a system alleged to be unconstitutional, nor where the enrollment of the individual plaintiff would not check the mischief charged in the bill. *Giles* v. *Harris* (1902) 189 U. S. 475.

Notwithstanding the attempt of the court to discuss the case on its merits it is doubtful whether anything more was decided than that the plaintiff had misconceived his remedy. It is sound law that equity has no jurisdiction over violations of the political rights of the citizen. (*Green* v. *Mills* 69 Fed. Rep. 852.) However if the plaintiff has been unjustifiably refused registration either by reason of the arbitrary decision of the Board of Registrars or because the entire system of registration is unconstitutional and void, he may bring the matter before the Federal Courts in a suit at law. *Wiley* v. *Sinkler* (1900) 179 U. S. 58; *Swafford* v. *Templeton* (1901) 185 U. S. 487. But there is no way of obtaining specific relief from a Federal Court, as equity will not act to compel registration, and such courts have no power to issue a mandamus.

CONSTITUTIONAL LAW—FRAUDULENT CONVEYANCE—POWER OF LEGISLATURE TO DEFINE PRIMA FACIE CASE. Act 99 of 1897 (Comp. Laws of Mich. § 10,203) provided that, in suits in aid of execution, the complainant should make out a *prima facie* case of fraudulent conveyance by proving a judgment against the principal defendant, execution and levies thereon, and the conveyance complained of. *Held*, (GRANT and MOORE, JJ., *dissenting*), the act was constitutional. *Crane* v. *Waldron* (Mich. 1903) 94 N. W. 593.

In prescribing what shall be evidence and which party shall assume the burden of proof, the power of the legislature is, in civil cases, practically unrestricted. Cooley Const. Lim. (6th ed.) 452; *Ogden* v. *Saunders* (1827) 12 Wheat. 213 at 349. Even in criminal cases it may enact that certain facts shall be *prima facie* evidence of the main fact. *Commissioners* v. *Merchant* (1886) 103 N. Y. 143; *Robertson* v. *People* (1894) 20 Col. 279. *Contra*: *State* v. *Beswick* (1881) 13 R. I. 211. In criminal cases, however, the fact upon which the presumption rests should have some fair relation to the main fact; should not be purely arbitrary or extraordinary. *People* v. *Cannon* (1893) 139 N. Y. 32. The principal case was a civil action. But even considering it as quasi-criminal, it would seem that the legislature has not exceeded its powers, and that the evidentiary fact does bear a fair relation to the fact in issue.

CONSTITUTIONAL LAW—LIMITATIONS—APPLICATION TO NEW POSSESSIONS. After the annexation of Hawaii the defendant was convicted of manslaughter under a criminal procedure other than that described in Amendments V and VI. The Annexation Resolution provided that the laws of the Republic of Hawaii should remain in force unless contrary to the Constitution of the United States. *Held*, conviction sustained. The Hawaiian criminal procedure was not contrary to the Constitution under the meaning of the Annexation Resolution. *Hawaii* v. *Mankichi*, (1903) 190 U. S. 197. See NOTES, p. 481.

CONSTITUTIONAL LAW—SEPARATION OF POWERS—JUDICIAL ACTS. N. J. Gen. St. p 2618. authorized the appointment, by a justice of the Supreme Court, of park commissioners in a certain class of counties. *Held*, the legislature had constitutional authority to confer such powers upon the Supreme Court. *Ross* v. *Board of Chosen Freeholders of County of Essex et al.* (Md. 1903) 55 Atl. 310.

Md. Acts 1896, p. 314, c. 195, provided that a petition under the local option law in W. county should be presented to the circuit court, which should count the signers, ascertain whether they had voted at the last state election, and thereupon order an election. *Held*, the act was void, as imposing on the court non-judicial duties, in violation of the State constitution. *Board of Sup'rs of Election for Wicomico County* v. *Todd et al.* (Md. 1903) 54 Atl. 963.

Md. Acts 1902, p. 670, c. 455, places the court house and grounds of certain counties in the custody of the crier of the circuit court of such counties. Const. art. 4, § 9, provides that the judges of any court may appoint the necessary court officers, etc. Declaration of Rights, art. 8, declares that no person exercising judicial functions shall discharge duties of another character. *Held*, the statute violated the constitution in imposing on the judges—who appoint the crier—non-judicial functions. *Prince George's County Com'rs* v. *Mitchell.* (Md. 1903) 55 Atl. 673.

Two questions are presented in these cases: (1) Is the judiciary confined to functions essentially judicial, or may it discharge functions not expressly or impliedly delegated by the constitution to other departments and (2) What acts are essentially judicial, executive or legislative? The Maryland cases hold that the judiciary is confined to essentially judicial functions, and others cannot be imposed on it even indirectly; while the New Jersey case, overruling *In re Cleveland* (1889) 51 N. J. Law 311, and *Schwartz* v. *Dover* (1902) 53 Atl. 214, holds that the judiciary may do anything not expressly or impliedly allotted in the Constitution to the other departments. The two holdings represent contradictory lines of decision in various jurisdictions. New Jersey is supported by *People* v. *Morgan* (1878) 90 Ill. 558; *Fox* v. *McDonald* (1892) 101 Ala. 51; *Russell* v. *Cooley* (1882) 69 Ga. 215. Maryland is supported by *Case of Supervisors of Election* (1873) 114 Mass. 247; *State* ex rel. *White* v. *Barker* (Ia 1902) 89 N. W. 204; *Houseman* v. *Kent* (1885) 58 Mich. 364. As to what are essentially judicial functions see 3 COLUMBIA LAW REVIEW, 280.

CORPORATIONS—MERGER. The Northern Securities Company, an independent corporation, acquired the majority of the stock of the Northern Pacific and Great Northern Railways, in pursuance of an agreement between the stockholders of these railways. *Held*, the agreement was not in restraint of trade or commerce within the Minnesota anti-trust law, or the Minnesota statute against consolidation. *State of Minnesota* v. *Northern Securities Co.* (C. C., D. Minn. 1903) 123 Fed. 692.

As LOCHREN, J. admits in his opinion, this decision is directly *contra* to that in *United States* v. *Northern Securities Co.* (C. C., D. Minn. Feb. 1903) 120 Fed. 721, inasmuch as the Minnesota anti-trust law is substantially the same as the Sherman Act of 1890. After a discussion of the cases interpreting the Sherman Act in the Supreme Court of the United States, he draws the conclusion "that contracts which do not directly and necessarily affect transportation, or rates therefore, are not in restraint of trade, or within the statute, even though they may remotely and indirectly appear to have some probable effect in that direction." Applying this rule, he points out that neither the Northern Pacific Co., nor the Great Northern Co., in their corporate capacities had anything to do with forming the Northern Securities Co.; that the Northern Securities Co. is merely the owner of a majority of the stock of these two roads, having no power to manage them, nor is there evidence that it has tried to do so; and that he is "compelled to reject the doctrine," as advanced in the United States case, "that any person can be held to have committed or to be purposing and about to commit, a highly penal offense, merely because it can be shown that his pecuniary interests will be thereby advanced, and that he has the power, either directly by himself, or indirectly through persuasion or coercion of his agents, to compass the commission of the offense." For a discussion of this question see 3 COLUMBIA LAW REVIEW 168, 221, 305, 404.

CORPORATIONS—RELATION OF STOCKHOLDERS AND CREDITORS TO DIRECTORS —STATUTE OF LIMITATIONS. Bill in equity by the creditors of the defendant corporation to obtain, with other relief, damages for malfeasance in office of the defendant directors. The defendants pleaded the Statute of Limitations. *Held*, the defendants were not trustees of a technical trust and could therefore plead the statute. *Boyd* v. *Mutual Fire Ass'n et al.* (Wis. 1903) 94 N. W. 171. See NOTES, p. 487.

CORPORATIONS—VOTING TRUSTS—RIGHTS OF STOCKHOLDERS. The reorganization committee of an insolvent corporation, appointed by a majority of the stockholders, who were citizens of Great Britain, issued a circular to such stockholders suggesting a voting trust and asking that the consents enclosed be signed and returned. In case of the refusal of any stockholder, the committee reserved the right to reject his subscription to shares. Subsequently the committee transferred the stock, the title to which they still held, to a holding corporation as trustee; the conveyance provided that the trust should endure fifty years, and gave the trustee absolute power to vote the stock as it should see fit, revocable only by three-fourths of the pooling stockholders. The trust agreement was without consideration. *Held* (1) Any stockholder who had been a party to the agreement, or a purchaser from him, could revoke the trust at any time. (2) The American stockholders could enjoin the carrying out of the trust. *Warren* v. *Pim* (N. J. 1903) 55 Atl. 66. See NOTES, p. 482.

CRIMINAL LAW—ACCUSED AS WITNESS—WAIVER OF PRIVILEGE. The defendant, in a criminal case, after taking the stand in his own behalf, refused to answer a question which, though relevant, tended to convict him of another crime. *Held*, the trial court committed no error in compelling him to answer. *People* v. *Dupounce* (Mich. 1903) 94 N. W. 388.

The decision is correct. A prisoner cannot be compelled, against his will, to testify, but when he voluntarily goes on the stand he waives this constitutional privilege. Once on the stand he must answer every question relevant to the issue, whether or not it tends to convict him of the

crime in question or of any other crime. *Commonwealth* v. *Nichols* (1873) 114 Mass. 285; *State* v. *Pancoast* 35 L. R. A. 518 at 527. *Contra*, Cooley on Const. Lim. p. 384. The preponderance of authority is in favor of the view in the principal case. The court concedes that *State* v. *Wintham* (1881) 72 Me. 531 is opposed to its view, but a close examination shows it to be entirely in accord.

EQUITY—INJUNCTION TO RESTRAIN UNFAIR COMPETITION. Complainant was the manufacturer of "Remington" typewriters. Defendant corporation, composed of Franklin and Carter Remington, Sholes and others, manufactured typewriters and marked them "Remington-Sholes" and "Rem-Sho." Complainant applied for an injunction to restrain defendant from using the name "Remington" and its abbreviation "Rem." The injunction was granted as to the word "Remington," but refused as to the abbreviation. *Wyckoff, Seamans & Benedict* v. *Howe Scale Co.* (C. C. A. Second Circuit, 1903) 122 Fed. 348.

An individual may use his own name honestly in his business, even though he may incidentally interfere with and injure the business of another having the same name. *Singer Mfg. Co.* v. *June Mfg. Co.* (1896) 163 U. S. 169; 2 COLUMBIA LAW REVIEW 245. As to a corporation, a different rule of law exists. It may choose from the "entire vocabulary of names." If the name chosen will mislead the public its use will be restrained, although it is the name of a member of the corporation. It is unfair competition for the corporation to adopt a name so like the complainant's that the corporation will derive benefit from the reputation already possessed by complainant's goods or business. *R. W. Rogers Co.* v. *Wm. Rogers Mfg. Co.* (1895), 70 Fed. 1017; *Massam* v. *Thorley's Cattle Food Co.* (1880) L. R. 14 C. D. 748. The injunction was refused as to the word "Rem" on the ground that it was not sufficiently like "Remington" to be a reasonable cause of confusion.

EVIDENCE—ADMISSIONS OF AN AGENT—RES GESTÆ. Where the question was as to the quality of certain printing plates, *held*, statements by an employee of defendants who had full charge of the machines, made in the presence of officers of the plaintiff company, that the plates worked nicely and were satisfactory, were admissible as res gestæ and as made by an agent while acting within the scope of his authority. *Stecher Lithographic Co.* v. *Inman et al.* (N. Y. 1903) 67 N. E. 212.

The New York court admits the evidence as a part of the res gestæ though in discussing its admissibility the court treats the question as one of authority on the part of the agent to bind his principal. In these agency cases there is generally no question of res gestæ. The question is one of admissions. If the agent makes the statement while acting within his authority his statement binds the principal because it becomes the statement and act of the principal. But if uttered outside the scope of his agency, the principal is not bound by it, and the evidence should not be admitted. For an exposition of the correct principle see Thayer, Cas. Ev. pp. 629-636. See also *White* v. *Miller* (1877) 71 N. Y. 118 at p. 135.

EVIDENCE—PRIVILEGED COMMUNICATION. The defendant was charged with bribery and summoned before the grand jury. He consulted the presiding judge privately as to what course he should pursue. The judge refused to give advice, telling him he should see an attorney but stated that if he testified it would be best to tell the truth. The defendant then confessed to the judge. *Held*, the confession was privileged and inadmissible. *People* v. *Pratt* (Mich. 1903) 94 N. W. 752.

The confession was purely voluntary and unless shielded by the rule protecting confidential communications between attorney and client, should have been admitted. By the great weight of authority this rule applies only when the relationship of attorney and client actually exists. *Montgomery* v. *Perkins* (1899) 94 Fed. Rep. 23; *Rosseau* v. *Bleau* (1892) 131 N. Y. 177. In a few states the rule is extended to cover cases where

the person making the communication reasonably supposed that it existed. *Alderman* v. *People* (1857) 4 Mich. 414. The statements must be made to the attorney in the course of professional employment and induced by the relation. *Williams* v. *Fitch* (1859) 18 N. Y. 546 at p. 551; *Hatton* v. *Robinson* (1833) 14 Pick. 416. The decision in the principal case seems to rest on the "attorney and client" rule and on broad grounds of policy. It clearly does not come within the rule nor does the policy on which it rests justify the decision. A contrary result was reached in *State* v. *Chambers* (1893) 45 La. Ann. 36.

INSURANCE—PRORATING LOSS BETWEEN SPECIFIC AND BLANKET POLICIES. The plaintiff insured a building, the policy to cover any addition he might build. He later built an addition and took out insurance upon it alone with the defendant company, the policy having the usual pro rata clause. In a suit upon this policy after the burning of the addition *held*, specific policies do not prorate with blanket policies and that therefore the defendant was liable for the full amount of the loss. *Meigs* v. *Ins. Co.* (Pa. 1903) 54 Atl. 1053.

In holding as it did in the principal case the court followed the well-established rule in Pennsylvania; *Clarke* v. *Assurance Co.* (1892) 146 Pa. 561, but it is hard to justify the decision on principle for a blanket policy in its very nature covers each and every part of the subject of insurance and it does not any the less cover them because there happens to be a specific policy on some particular item. Thus the destroyed property was covered by both policies and it would seem proper to prorate the loss between them. And this, by the great weight of authority, should be the rule. *Page* v. *Sun Ins. Office* (1896) 74 Fed. 203; *Blake* v. *Ins. Co.* (Mass. 1858) 12 Gray 265; *Ogden* v. *Ins. Co.* (1872) 50 N. Y. 388. For the method of prorating the loss under this rule see 3 COLUMBIA LAW REVIEW 283.

INSURANCE—REDUCTION OF POLICY BY INSURER—REMEDY OF INSURED. Defendant insurance association issued policies promising to pay $5,000 on the death of the member holding same. A subsequent by-law reduced the amount payable on any policy to $2,000. *Held*, plaintiff, a policy-holder, was entitled to treat the contract of insurance as broken and recover the premiums paid, with interest. *Black* v. *A. L. of H.* (C. C., E. D. Pa. 1903) 120 Fed. 580.

This case, which was noticed in 3 COLUMBIA LAW REVIEW 423, has recently been affirmed by the Circuit Court of Appeals, Third Circuit, reported in 123 Fed. 650. It represents the great weight of authority as to the remedy of the insured when the insurer wrongfully renounces the contract. In New York it is held that the only remedy of the insured is to keep the original contract alive by a regular tender of premiums or to apply to a court of equity to restrain the insurer from acting under its void by-law. *Langan* v. *A. L. of H.* (1903) 174 N. Y. 266. For a criticism of the New York view see COLUMBIA LAW REVIEW, *supra*.

INTOXICATING LIQUORS—WHAT CONSTITUTES SALE—SOCIAL CLUB. Members of a social club were sold checks which upon presentation entitled them to liquor furnished by the club. *Held*, this was a "sale" of liquor and a violation of the Dramshop Act (Hurd's Rev. St. Ill., 1901, p. 750) which prohibits the sale of spirituous liquors without a license. *People* v. *Law & Order Club* (Ill. 1903) 67 N. E. Rep. 855.

Whether or not such a state of facts constitutes a sale has been decided differently in different States and the decisions seem to be irreconciliable. The leading case holding that such an act is not a sale is *Graff* v. *Evans* (1882) L. R. 8 Q. B. Div. 373 where it was held that there was merely a transfer to the member of a special property since he, as a member, already had an interest in the goods. Opposed to the decisions following *Graff* v. *Evans* are those cases which hold that for any and all purposes a sale has taken place. *Newark* v. *Essex Club* (1890) 53 N. J. L. 99. There is however a rule between these extremes which has been adopted in some States and under which many if not most of the

decisions may be reconciled, *i. e.* such a transaction, although technically a sale, is not a violation of the statute if the Club is such *bona fide* and the sale of liquor is merely incidental to the other purposes for which the Club was formed. *State* v. *St. Louis Club* (1894) 125 Mo. 308; Black on Intox. Liq. §142.

MASTER AND SERVANT—SERVANT UNDER CONTROL OF THIRD PERSON. Plaintiff was servant of a firm of stevedores who were unloading defendant ship. The ship furnished the winchman who was, as to the operation of the winch, under the control of the stevedores. Plaintiff was injured through the negligence of the winchman. *Held*, the winchman was the servant of the ship, not of the stevedores, and the plaintiff could recover. *The Slingsby* (C. C. A., 2nd Circ., 1903) 120 Fed. 748.

The decision lays down the rule that when the master determines the line of work and retains the right to recall or discharge the servant, the relation of master and servant continues between them. This is supported by the weight of authority. *The Lisnacrieve* (1898) 87 Fed. 570; *Murray* v. *Dwight* (1900) 161 N. Y. 301; *Coggin* v. *Central R. Co.* (1879) 62 Ga. 685. Several jurisdictions, however, reach precisely the opposite result, holding that a change of control, even temporary, involves *pro tanto* a change of masters. *Hasty* v. *Sears* (1902) 157 Mass. 123; *Roe* v. *Winston* (1902) 86 Minn. 77; *Delaware, etc., R. Co.* v. *Hardy* (1896) 59 N. J. L. 35. The support of the principal case involves the doubtful holding that the acts of the servant were the acts of one who exercised no immediate control over him and who had transferred the right of such control to another.

MUNICIPAL CORPORATIONS—IMPLIED CONTRACTS. Where a statute provided that contracts made by a township trustee must be in writing and a bond given and that contracts made in violation of the act shall be void, *held*, no recovery can be had on notes given by a township trustee, in payment for goods, where the statutory steps have not been complied with; nor can the plaintiff recover on a quantum meruit. *Peck Williamson Heating & Ventilating Co.* v. *Steen School Tp. of Knox County* (Ind. 1903) 66 N. E. 909.

There is a conflict of authority as to whether a municipal corporation can become liable on an implied contract. It is well settled however that where the charter of a city or a statute has prescribed certain formalities which shall enter into the making of all municipal contracts, the city cannot be held liable on an implied contract to pay for benefits received, in the absence of a contract made in the manner prescribed. *McDonald* v. *Mayor* (1876) 68 N. Y. 23; *Zottman* v. *San Francisco* (1862) 20 Cal. 96. The object of such a statute is to protect the municipality from the making of contracts by unauthorized public agents and therefore it is strictly enforced.

PARTNERSHIP—GOOD WILL—SALE OF FIRM NAME TO STRANGER. In an action for an accounting between the executrix of the estate of a deceased partner and the surviving partner, *held*, the firm name is part of the good-will and can be sold under a court order like any other asset. *Slater* v. *Slater* (Ct. of App. 1903) 29 N. Y. L. J. 675.

The firm name was common property at common law. *Caswell* v. *Hazard* (1890) 121 N. Y. 484 That the good-will is part of the firm assets in which the estate of the deceased partner can now participate is well settled. 2 Bates on Partnership § 658 and cases cited. The firm name is certainly of great value and is the principal, perhaps the only means of obtaining all of the good-will of the firm, and would pass with it by necessary implication. 1 Collyer on Partnership, 6 Ed. 572. *Levy* v. *Walker* (1879) L. R. 10 Ch. Div. 436 at p. 448; *Snyder Mfg. Co.* v. *Snyder* (1896) 54 Ohio St. 86 at p. 96. *Contra*, overruled by principal case, *Reeves* v. *Denicke* (1871) 12 Abb. Pr. N. S. 92. The ground for enjoining a partner, who has sold the good-will, from using the firm

name is slightly different namely, that by so using it he holds himself out as continuing the business which would be a fraud on the parties to whom he has sold the good-will. *Myers* v. *Kalamazoo Buggy Co.* (1884) 54 Mich. 215.

PATENT—INFRINGEMENT OF COPYRIGHT—USE OF PRIOR WORKS. Publishers of the *Encyclopedias of American and English Law* and of *Pleading and Practice* sought to enjoin the publication of the *Cyclopedia of Law and Procedure* on the ground of infringement of copyright, alleging that defendant's editors used original lists of authorities appended to articles in complainant's works in the preparation of new articles, and after examining the sources referred to, cited in support of their conclusions such as seemed apt. *Held*, these acts did not amount to an infringement and the temporary injunction should be dissolved. *Edward Thompson Co.* v. *American Law Book Co.* (C. C. A. 2nd Cir. 1903) 122 Federal Rep. 922.

In cases where the rival works are not strictly original but based on common sources, the distinction recognized as governing the case in question, between incorporating the results of another's research in the volume complained of without independent examination, and using the authorities cited by a predecessor as an aid in a new survey of the same field, or as a basis for cognate literary production, is sound and has commended itself to the judicial mind. *Morris* v. *Wright* (1870) L. R. 5 Ch. Ap. 279; *Banks* v. *McDavitt* (1875) 13 Blatchf. 163. The evil consequence of an opposite holding is thus described by the court: "It would be a serious blow to Jurisprudence were the rule enunciated that the author of a law book is precluded from taking a list of authorities cited by a previous writer and making an independent examination of them."

REAL PROPERTY—CONDEMNATION—DEED. Where a land owner contracted with a railroad to convey real estate which the latter was authorized by statute to acquire, and subsequently deeded the property to plaintiff, *held*, plaintiff could maintain ejectment against the railroad. *Wilson* v. *Muskegon Co.* (Mich. 1903) 93 N. W. 1059.

The view in the dissenting opinion that title vests when the railroad takes possession with the consent of the owner and satisfies the stipulated terms as to compensation, was properly rejected by the majority. The State may by legislative act effect a change of title immediately, reserving to the former owners only a right to compensation. *Purifoy* v. *Railroad* (1891) 108 N. C. 100. But where the statute simply gives the right to acquire property, and resort to condemnation proceedings is not necessitated, private negotiations entered into by the company have no higher effect than is attributed to them by the ordinary rules of private law. Hence in such cases unless the property be condemned a deed is essential to a perfect legal title. *Telford* v. *Railroad* (1898) 172 Ill. 559; Lewis on Eminent Domain § 289.

TORTS—ACTION FOR DEATH BY NONRESIDENT ALIEN AS NEXT OF KIN. Sec. 5913, Gen. St. Minn. 1894, gives a right of action for the benefit of the next of kin of the deceased when death has been caused by negligence. In an action to recover damages for the death of a laborer in a mine, caused by the negligence of the master in controlling its skip cars, *held*, nonresident aliens who are next of kin are entitled to the benefits conferred by the statute. *Reulund* v. *Commodore Min. Co.* (Minn. 1903) 93 N. W. 1057.

Statutes in this country following "Lord Campbell's Act" seem to present primarily two aspects: punishment for the negligent person, as in Massachusetts and Missouri, where the amount of recovery is either fixed or measured by the degree of culpability; or compensation for the persons dependent on the deceased, as in Pennsylvania, Georgia, Illinois, Minnesota, and most other states where such legislation exists. If primarily punitive the police power of the state is called on, and it is of less importance whether the action is by a citizen or nonresident alien. Ac-

cordingly, while *Mulhall* v. *Fallon* (1900) 176 Mass. 266, is usually cited to support holdings like that of the Minnesota court, it does not necessarily follow from the decision in that case that a nonresident alien should be allowed to sue under a compensatory act. *Deni* v. *Penn. R. Co.* (1897) 181 Pa. St. 525, holds against the nonresident alien. *Brannigan* v. *Union Co.* (1899) 93 Fed. 164, a decision by the United States Court for Colorado, holds with Pennsylvania; while *Vetalora* v. *Perkins* (1900) 101 Fed. 393 decided by the U. S. Circuit Court for Massachusetts, interpreting the Massachusetts statute as compensatory, allows the nonresident alien to sue. The question seems to be one of policy: Shall a person not liable to duties imposed by the Legislature receive benefits granted by it or shall a statute framed in general terms be restricted to persons in the state?

TORTS—ACTION FOR MALICIOUS PROSECUTION. *Held*, the defendant in a civil action, prosecuted maliciously and without probable cause, cannot maintain an action for such malicious prosecution unless there was, in the original action, some interference with the defendant's person or property by arrest, attachment or other provisional remedy. *Paul* v. *Fargo* (1903) 82 N. Y. Supp. 369. See NOTES, p. 479.

TRUSTS—LEGACIES CHARGED ON LANDS—STATUTE OF LIMITATIONS. The plaintiff's intestate was a legatee under a will, and the plaintiff, as administrator, brought an action in equity to enforce a lien on the land of which the defendant was devisee, said land being charged with a lien for the amount of the legacies. The defense of the statute of limitations was interposed by the defendant, but overruled on the ground that he was an express trustee. On appeal, *held*, the defendant was not trustee of an express trust and hence the statute of limitations ran in his favor. *Merton* v. *Obrien et al.* (Wis. 1903) 94 N. W. 340.

By the acceptance of the devise the defendant became liable at law on a promise to pay the legacy, implied from the acceptance of the land on which it is a charge. *Evans* v. *Foster* (1891) 80 Wis. 509; *Gridley* v. *Gridley* (1861) 24 N. Y. 130. The case is, therefore, not one of those "technical and continuing trusts, which are not cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of equity to which the statute is no bar." See NOTES, p. 487.

TRUSTS—PREFERENCE OF CESTUI'S CLAIM FOR BREACH. H, owning one third of his deceased wife's estate absolutely, and two thirds in trust for her son, squandered more than half of the whole. The interest of the trustee in a parcel of land remaining was attached by his creditors, who had judgment. A bill was filed by the successor of H, as trustee, to declare a trust of the interest attached in favor of the *cestui*. *Held*, the latter had no lien by reason of the breach of trust, prior to that of the attaching creditors. *Wales* v. *Sammis* (Ia. 1903) 94 N. W. 840.

The case is supported by *in re Estate of Fox* (1883) 92 N. Y. 93, and is sound in principle. When trust property cannot be traced, the beneficiary's equitable right to indemnity gives him only the standing of a simple contract creditor. *Kearnan* v. *Fitzsimon* (1794) 3 Ridg. 1. Cases allowing preference to the *cestui* wherever trust funds have entered the trustee's estate, *McLeod* v. *Evans* (1886) 66 Wis. 401; *Capital Nat. Bank* v. *Coldwater Nat. Bank* (1896) 49 Neb. 786; *Evangelical Synod* v. *Schoeneich* (1898) 143 Mo. 652, seem to be based upon an unwarranted extension of the holding in *Knatchbull* v. *Hallett* (1879) L. R. 13 Ch. Div. 696, that where the trust fund can be traced into a larger fund forming part of a defaulting trustee's estate, the *cestui* is entitled to the amount of the trust fund in preference to the trustee's creditors. Such cases have in several instances been overruled. *Silk Co.* v. *Flanders* (1894) 87 Wis. 237; *Lincoln Bank* v. *Morrison* (Neb. 1902) 57 L. R. A. 885.

TRUSTS—PUBLIC CHARITY—BENEFICIARIES—INDEFINITENESS. The plaintiff and others, whom he represented, as heirs of S., asked for a construction of a clause in the will of S., which contained a bequest in trust for

the benefit of the poor, giving to the trustee discretion in the selection of worthy objects of the charity. The claim was made that the bequest was invalid for uncertainty as to beneficiaries. *Held*, a purely charitable bequest. "The poor" sufficiently designated a class. *Grant* v. *Saunders* (Ia. 1903) 95 N. W. 411. See 3 COLUMBIA LAW REVIEW, 269.

TRUSTS—SAVINGS BANKS—RELATION OF MANAGERS TO DEPOSITORS. The plaintiff, a depositor in the defendant savings-bank, brings a bill to restrain the defendant managers of said bank from dissolving the defendant corporation and distributing the assets, not including the good-will, and from persuading depositors to deposit their accounts in a trust company incorporated by such managers. *Held*, the defendant managers were trustees for the depositors and that their acts would be a breach of trust and would be restrained. *Barrett* v. *Bloomfield Sav. Inst. et al.* (N. J. 1903) 54 Atl. 543.

The New Jersey courts have intervened before, on the application of managers of savings-banks for direction, taking the same ground, namely, that such managers are trustees for the depositors. *Stockton* v. *Bank* (1880) 32 N. J. Eq. 163. This seems to be held generally. *Foster* v. *Bank* (1898) 88 Fed. 604; *Marshall* v. *Bank* (1889) 85 Va. 676 and is the holding in New York, *Hun* v. *Cary* (1880) 82 N. Y. 65, where it is also held that the relation of the bank to the depositor is that of creditor to debtor, *People* v. *Barker* (1897) 154 N. Y. 128. The continuance of the injunction in the principal case would seem, therefore, to be a valid exercise of the courts' control over such fiduciaries, since there is here a plain breach of trust, inasmuch as the managers intend to dissolve the corporation for their own benefit and to convert the good-will, an enormous asset in a banking business, to their own use.